UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-10201-RWZ

MARK OBERSHAW

v.

KATHLEEN LANMAN and PETER ALLEN

MEMORANDUM OF DECISION

August 22, 2005

ZOBEL, D.J.

On June 7, 1999, a jury convicted petitioner Mark Obershaw in state court of first degree murder by extreme atrocity or cruelty for beating and killing his brother with an automobile anti-theft device known as the Club. He was sentenced to life without parole. He appealed. On February 5, 2002, the Massachusetts Supreme Judicial Court ("SJC") affirmed his conviction. Commonwealth v. Obershaw, 762 N.E.2d 276 (Mass. 2002). Thereafter, on January 21, 2003, petitioner filed a petition for habeas corpus pursuant to U.S.C. § 2254[1] on the following four grounds: (1) the state court's refusal to tell the jury that a unanimous verdict was required when considering the Massachusetts factors concerning extreme atrocity or cruelty violated his rights under the 5th, 6th and 14th Amendments; (2) the admission of petitioner's statements violated his rights under the 4th, 5th and 14th Amendments; (3) the prosecutor's closing

[1] Petitioner is now incarcerated out of state and has filed his petition against the superintendent of that state as well as this state. Because his incarceration is subject to the control of Massachusetts correctional officials, respondent Peter Allen is the real party in interest here.

argument and cross-examination of petitioner were improper, prejudicial and violated his rights under the 5th and 14th Amendments; and (4) the state court's jury instruction on malice aforethought violated his rights under the 5th and 14th Amendments.

Title 28 U.S.C. § 2254(d) provides that an application for a writ of habeas corpus may not be granted unless the state court adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Furthermore, Section 2254 provides that where the petitioner is in custody pursuant to "the judgement of a State court, a determination of a factual issue made by a State court shall be presumed to be correct" and petitioner has the "burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In ground one, petitioner contends that the state court erred in refusing to instruct the jurors that they must unanimously agree on the factors supporting a finding of extreme atrocity or cruelty as listed in Commonwealth v. Cunneen, 449 N.E.2d 658 (Mass. 1983). In Cunneen, the SJC provided guidelines that "a jury can consider in deciding whether a murder was committed with extreme atrocity or cruelty[,]" which included "indifference to or taking pleasure in the victim's suffering, consciousness and degree of suffering of the victim, extent of physical injuries, number of blows, manner and force with which delivered, instrument employed, and disproportion between the means needed to cause death and those employed." Id. at 227. The SJC observed

that unanimity is not necessary because the Cunneen factors are "'evidentiary considerations,'not elements of the crime or separate theories of culpability." Commonwealth v. Obershaw, 762 N.E.2d 276, 290 (Mass. 2002), quoting Commonwealth v. Hunter, 695 N.E.2d 653, 658 (Mass. 1998). Because these evidentiary factors are not elements nor do they increase the maximum criminal penalty, petitioner's reliance on Richardson v. United States, 526 U.S. 813 (1999), and Apprendi v. New Jersey, 530 U.S. 466 (2000), is misplaced. See Richardson, 526 U.S. at 817 ("a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element."); Apprendi, 530 U.S. at 490 ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."). Ground one is denied.

In ground two, petitioner asserts that the state court should have suppressed his statements to the police and any resulting evidence because: (1) they were elicited without a knowing and voluntary waiver of constitutional rights after he invoked his right to an attorney, (2) they were the fruit of an illegal arrest, and (3) they were elicited more than six hours after the arrest in violation of the Massachusetts "safe harbor" rule. Here, the SJC determined that after petitioner signed a written waiver of his Miranda rights, he never affirmatively requested an attorney. Although petitioner asked the police if he could talk to a lawyer before taking them to his brother's body, he declined to use the telephone and instead went outside and spent time with his dogs. A while later, he initiated a conversation with an officer outside. The officer offered to let

petitioner use the phone to call his attorney and cautioned him that further talk was impermissible under the circumstances. Petitioner declined. After spending some additional time with his dogs, petitioner told a trooper where his brother was buried. On these facts, the state court found that petitioner had never affirmatively requested an attorney. This conclusion comports with federal law. Edwards v. Arizona, 451 U.S. 477, 484-5 (1981) (A suspect who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.") Petitioner did not express a clear desire to deal with the police only through counsel and, in fact, he voluntarily initiated conversation with the police.

Habeas relief is not available for petitioner's assertion that his statements were the fruit of an illegal arrest. "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone v. Powell, 428 U.S. 465, 494-5 (1976). Petitioner was afforded a trial and appeal, and a two-day evidentiary hearing on his motion to suppress. Likewise, there is no relief for petitioner's claim that the statements were elicited more than six hours after arrest in violation of the Massachusetts "safe harbor" rule. Petitioner has not alleged a violation of his federal rights. Therefore, ground two is denied.

In ground three, petitioner contends that the prosecutor's improper closing

remarks and his cross-examination of petitioner violated his due process rights. More specifically, petitioner contests a number of the prosecutor's closing statements: 1) his personal opinion that petitioner had lied, 2) his allegation that petitioner was indifferent to the victim's suffering, 3) certain arguments lacking evidentiary bases, and 4) appeals to the jury's sympathies and passions. It is not sufficient that the prosecutor's remarks were "'undesirable or even universally condemned[,]' [t]he relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986)(citations omitted).

Because there was evidence that petitioner changed his story between the time of arrest and the trial, the SJC stated that the prosecutor's comment was fair: "[t]he prosecutor did perhaps repeat the liar refrain more than was necessary, but the suggestion that the defendant was a liar found ample support in the evidence." Commonwealth v. Obershaw, 762 N.E.2d 276, 289 (Mass. 2002). The SJC further determined that the prosecutor's statements that petitioner's testimony was an insult to the jury were "rhetorical flourish" and recognized as such by the jury. Id. As to the prosecutor's statement that "you bet he was" indifferent to the victim's suffering, the SJC determined that it was a "colloquial way of emphasizing the defendant's indifference" and not a reflection of personal opinion. Id.

Petitioner asserts that there was no evidence from which the prosecutor could argue that the victim was struck by ten blows, that the gouge marks in the bathroom were caused by petitioner's Club, that the victim was alive throughout the beating, or

that the victim begged petitioner to stop hitting him. However, the SJC found that the prosecutor's arguments were supported by evidence. The medical examiner testified that at least ten blows were struck. Furthermore, although the judge excluded expert testimony on the source of the gouge marks, she did state that the prosecutor could argue by inference that the marks were caused by the Club. That the victim was alive throughout the beating was supported by petitioner's own testimony that the victim died in his arms after the beating and the medical expert who testified about defensive wounds on the victim's arms and hands and swelling and bleeding in his brain which took time to develop. Also, petitioner testified that he had dragged the victim by the ankles after the beating and the medical examiner stated that the bruises on the victim's ankles were sustained while he was alive. Given that there was evidence to support the prosecutor's inferences, there was no unfairness that so infected the trial as to violate petitioner's due process rights.

Although there was no evidence supporting the inference that the victim begged the petitioner to stop beating him, the SJC found that the "suggestion by the prosecutor that the victim begged for his life was not central to the case" and furthermore, the trial judge did instruct the jury that closing arguments did not constitute evidence. Obershaw, 762 N.E.2d at 288. In view of the trial judge's instruction, petitioner has not shown a violation of his due process rights.

Petitioner also asserts that the prosecutor appealed to the jury's sympathies and passions by stating, "Now, I'm going to be honest with you, ladies and gentlemen, I don't really give a crap what he went through. I'm here to tell you what [the victim] went

through . . . ." Id. at 288. However, the SJC observed that petitioner did not contemporaneously object to this statement as required by the state rule and, therefore, its review was based on whether there had been any error "that creates a substantial likelihood of a miscarriage of justice." Id. Before this claim is reviewed in this Court, petitioner must show either cause and prejudice to excuse his procedural default, or show that a failure to consider it will result in a fundamental miscarriage of justice. Burks v. Du Bois, 55 F.3d 712, 716 (1st Cir. 1995). Because petitioner has not done so, the claim fails.

To the extent that petitioner is contesting the prosecutor's argumentative questions during his cross-examination, the SJC observed that in each instance, petitioner's objections were sustained and the prosecutor was instructed to "[m]ove on." Obershaw, 762 N.E.2d at 287. Because the questions were never answered, the SJC noted that nothing was before the jury. Furthermore, the trial judge told the jury that only the answers and not the questions constituted evidence. The SJC noted that even when the questions amounted to speeches, the objections were sustained and given the evidence overall, the impropriety was "insubstantial." Id. (citation omitted). Since all of petitioner's objections were sustained, he cannot show that his due process rights were violated. Ground three is denied.

Finally, in ground four, petitioner contends that the trial court's jury instruction on malice erroneously and unconstitutionally shifted the burden of proof onto petitioner. The trial court informed the jury that they were "permitted to infer that a person who intentionally uses a dangerous weapon on another person is acting with malice."

Obershaw, 762 N.E.2d at 289. The SJC found that the words "permitted to infer" did not create a mandatory presumption of malice, and the instruction was therefore proper. This Court agrees. See Sandstrom v. Montana, 442 U.S. 510, 514 (1979)(to determine the nature of a presumption described in jury instructions, the court must pay "careful attention to the words actually spoken to the jury.").

The petition is denied.

_____ /s/ Rya W. Zobel
DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE